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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA, Plaintiff, v. **OSVALDO RAMIREZ-BARRAZA**, Defendant.	CASE NO.: 08CR295-JM STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTIONS

I.

STATEMENT OF FACTS

According to the information provided by the government, which Mr. Ramirez-Barraza does not admit and reserves the right to challenge, United States Border Patrol Agents Anthony Balkas, Jeffrey Schwer and Kevin Geller were assigned to the El Centro Station Mountain Disrupt Unit on January 27, 2008. At approximately 12:00 a.m., video surveillance operators spotted eight individuals walking north through the desert near Davies Road and Highway 98. Agents Balkas and Schwer responded to the report of these individuals walking and soon apprehended them. One was identified as Osvaldo Ramirez-Barraza.

By the time the Agents apprehended Mr. Ramirez-Barraza, he told the Agents that had injured his ankle and was no longer able to walk. The Agents took turns carrying Mr. Ramirez-Barraza back to their vehicle due to his injury. Mr. Ramirez-Barraza was then read his administrative rights and requested medical care for his injured ankle. He was immediately transported to El Centro Memorial Hospital where he received medical treatment. It is not known at this time what types of medications were administered to him in the hospital. After being discharged from the hospital, Mr. Ramirez-Barraza was transported to the El Centro Border Patrol station and advised of his consular rights.

At 6:00 a.m., Border Patrol Agent Leo Jacinto advised Mr. Ramirez-Barraza that his administrative rights no longer applied and that he was goinog to be criminally prosecuted. Mr. Ramirez-Barraza was advised of his Miranda rights and allegedly stated that he understood his rights and was willing to answer questions without the presence of a lawyer. Mr. Ramirez-Barraza then allegedly admitted to being a citizen of Mexico without any valid immigration documents, on his way to Fresno to look for work. While it is unclear from the report signed by Border Patrol Agent Nicholas Fujiwara, it appears from court records that Mr. Ramirez-Barraza was then taken to the Imperial County Jail.

On February 6, 2008, Mr. Ramirez-Barraza was indicted for being a deported alien who attempted to enter the United States in violation of 8 U.S.C § 1326. The indictment alleged that Mr. Ramirez-Barraza was removed from the United States subsequent to August 27, 2007. A not guilty plea was entered.

I.

MOTION TO COMPEL DISCOVERY/PRESERVE EVIDENCE

Mr. Ramirez-Barraza moves for the production of the following discovery. This request is not limited to those items that the prosecutor knows of, but rather includes all discovery listed below that is in the custody, control, care, or knowledge of any "closely related investigative [or other] agencies." See United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

To date, ***defense counsel has received 110 pages of discovery***. Mr. Ramirez-Barraza respectfully requests that the Government be ordered to produce discovery because Mr. Ramirez-Barraza has reason to believe that he has not received all the discoverable material in his case. Ms. Ramirez-Barraza **specifically requests production of a copy of the taped proceedings and any and all documents memorializing the deportation proceeding allegedly held and any other proceedings that the Government intends to rely upon at trial**. This request includes discovery of materials known to the Government attorney, as well as discovery of materials which the Government attorney may become aware of through the exercise of due diligence. See FED. R. CRIM. P. 16.

Mr. Ramirez-Barraza has also not received a full copy of his A-file. Mr. Ramirez-Barraza specifically requests the documents memorializing the alleged deportation proceedings and any other proceedings that the Government intends to rely upon at trial.

Mr. Ramirez-Barraza additionally requests that the Court order the Government to allow him the opportunity to review his A-file in its entirety. First, the A-file contains documentation concerning his alleged deportation. Part of Mr. Ramirez-Barraza defense may be that his underlying deportation was invalid. The documents in the A-file would help illuminate the validity or futility of such a defense. For example, A-file documents typically contain biographical information. Such information is essential to determining whether Mr. Ramirez-Barraza deportation was invalid.

Second, the Government will likely try to show at trial that a Government officer searched the A-file and did not find an application by Mr. Ramirez-Barraza for permission to enter the United States. Mr. Ramirez-Barraza anticipates that the Government will attempt to admit a "Certificate of Non-Existence of Record" against him, arguing that if Mr. Ramirez-Barraza had ever applied for permission to enter the United States, such an application would be found in the A-file and because such an application is not in the A-file, Mr. Ramirez-Barraza must not have applied for permission to enter the United States.

Although the certificate might be admissible, the question of the thoroughness of the search conducted by the Government of the A-file is, and should be, open to cross-examination. United States v. Sager, 227 F.3d 1138, 1145 (2000) (error not to allow jury to "grade the investigation."). Mr. Ramirez-Barraza should be able to review his A-file in order to see whether any application for lawful admission exists. Moreover, Mr. Ramirez-Barraza should also be able to verify whether other documents that would ordinarily be in the A-file are "non-existent," or otherwise missing from his A-file. Mr. Ramirez-Barraza may assert a defense that his application for lawful entry was lost or otherwise misplaced by the Government. He must be allowed the opportunity to review his A-file and the manner in which it is being maintained by the Government in order to present this defense.

Mr. Ramirez-Barraza also requests a copy of the video from the remote surveillance system that alerted the Border Patrol to his alleged location, as well as recordings of any radio communications between the Border Patrol Agents involved in locating and apprehending him.

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II.

THE INDICTMENT MUST BE DISMISSED BECAUSE IT FAILS TO ALLEGE A SPECIFIC, POST-CONVICTION DATE OF REMOVAL

The Fifth Amendment requires that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." Consistent with this Constitutional requirement, the Supreme Court has held that an indictment must "fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." United States v. Carll, 105 U.S. 611, 612-13 (1881). It is black letter law that an indictment that does not allege an element of an offense, even an implied element, is defective, and should be dismissed. See, e.g., Russell v. United States, 369 U.S. 749, 769-72 (1962); Stirone v. United States, 361 U.S. 212, 218-19 (1960); United States v. Du Bo, 186 F.3d 1177, 1179 (9th Cir. 1999); United States v. Keith, 605 F.2d 462, 464 (9th Cir. 1979).

The 9th Circuit has recently held that an indictment alleging a violation of 8 U.S.C. §1326 must allege both "the dates of a previous felony conviction and of a previous removal from the United States, subsequent to that conviction." United States v. Salazar-Lopez, 506 F.3d 748, 749-750 (9th Cir. 2007). In Salazar-Lopez, the indictment charged the defendant with a violation of § 1326 but "did not allege that Salazar-Lopez had been previously removed subsequent to a felony conviction, nor did it allege a specific date for Salazar-Lopez's prior removal." Id. at 750. The 9th Circuit unequivocally held that the indictment "required" an allegation that the defendant "had been removed on a specific, post-conviction date." Id. at 751.

Here, the indictment fails to allege that Mr. Ramirez-Barraza "had been removed on a specific, post conviction date." Instead, the indictment only says that Mr. Ramirez-Barraza "was removed from the United States subsequent to August 27, 2007." The indictment completely fails to mention Mr. Ramirez-Barraza's prior conviction and a specific date of deportation after that conviction. This is insufficient under Salazar-Lopez and therefore the indictment must be dismissed.

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III.

THE STATEMENTS MUST BE SUPPRESSED UNDER MIRANDA AND A HEARING AS TO THE VOLUNTARINESS OF THE STATEMENTS MUST BE HELD

A. The Government Must Demonstrate That Mr. Ramirez-Barraza's Field Statements To Agent Balkas Were Given After He Knowingly And Voluntarily Waived His Miranda Warnings

1. Miranda Warnings Must Precede Custodial Interrogation

It is well known that before a defendant in custody can be questioned about alleged criminal activity, he must be given warnings under Miranda v. Arizona, 384 U.S. 436 (1966). Miranda explained that "when the person being interrogated is 'in custody at the station or otherwise deprived of his freedom of action in any significant way,'" warnings are required. Orozco v. Texas, 394 U.S. 324, 327(1969) (quoting Miranda, 384 U.S. at 477). A suspect is in custody if the actions of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably have led him to believe that he could not freely leave. See United States v. Lee, 699 F.2d 466, 468 (9th Cir. 1982); United States v. Bekowies, 432 F.2d 8, 12 (9th Cir. 1970). Although questions regarding routine biographical information usually do not trigger the safeguard of Miranda, the exception does not apply "where the elicitation of information regarding immigration status is reasonably likely to inculpate the [suspect]." United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1046 (9th Cir. 1990). In fact, because of the close relationship between civil and criminal immigration investigations, "[c]ivil as well as criminal interrogation of in-custody defendants by INS investigators should generally be accompanied by the Miranda warnings." United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983).

In determining whether an individual is in custody for purposes of Miranda, the 9th Circuit has instructed courts to consider "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; and (5) the degree of pressure applied to detain the individual." United States v. Kim, 292 F.3d 971, 973 (9th Cir. 2002) (citations omitted). The same considerations apply in the context of custody at the border. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980). Furthermore, questions by agents implying a person is suspected of criminal activity can give rise to a reasonable belief that one is not free to leave and thus turn an encounter with law enforcement into custody for purposes of Miranda. United States v. Chavez-Valenzuela, 268 F.3d 719, 725 (9th Cir. 2001). A person does not need to be physically restrained to be in "custody." The 9th Circuit has found that an individual questioned out in an open field, neither handcuffed or told he was under arrest, to be in custody for purposes of Miranda. United States v. Beraun-Panez, 812 F.2d 578, 579 (1987). In that case, the court held that "[a]lthough not physically bound, Beraun-Panez was subjected to psychological restraints just as binding." Id. at 580.

Mr. Ramirez-Barraza was clearly in custody. Although the Border Patrol report does not contain the specific language used by the officers to "summon" Mr. Ramirez-Barraza, the report explains that Agent Balkas identified himself as a Border Patrol Agent. Considered with the fact that Agent Balkas was in uniform, carrying a gun and in an isolated area near the Mexican border it is clear that Mr. Ramirez-Barraza knew he was in the custody of law enforcement. Further, Mr. Ramirez-Barraza was confronted with evidence of his guilt immediately as Agent Balkas began questioning him about his citizenship and nationality, the precise elements of the crime he was suspected of committing, illegal reentry in violation of 8 U.S.C. § 1326. The physical surrounding of the interrogation - in the brush close to the Mexican border - considered with the questioning by a clearly identified Border Patrol agent demonstrates that Mr. Ramirez-Barraza was suspected of criminal activity and thus in custody. See Chavez-Valenzuela, 268 F.3d at 725. Because Mr. Ramirez-Barraza was in custody when he was questioned, any questioning must have been preceded by Miranda warnings.

Therefore, unless the government demonstrates that the agents gave Mr. Ramirez-Barraza Miranda warnings before he made a statement and that he voluntarily, knowingly and intelligently waived those rights before giving a statement, no evidence obtained as a result of the interrogation can be used against him. Miranda, 384 U.S. at 479. Since Mr. Ramirez-Barraza was placed into Border Patrol custody and was immediately questioned directly about his citizenship and immigration status without any Miranda warnings, any and all statements must be suppressed. See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980).

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B. The Government Must Demonstrate That Mr. Ramirez-Barraza's Statements To Agent Jacinto At The Border Patrol Atation Were Given After He Knowingly And Voluntarily Waived His Miranda Warnings

1. Any Waiver by Mr. Ramirez-Barraza of His Rights Was Not Voluntary, Knowing, and Intelligent.

Mr. Ramirez-Barraza's statements must be suppressed based on any waiver of his rights not being voluntary, knowing, and intelligent. When interrogation occurs without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda v. Arizona, 384 U.S. 436, 475. It is undisputed that, to be effective, a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently, and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). To satisfy this burden, the prosecution must introduce evidence sufficient to establish "that under the 'totality of the circumstances,' the defendant was aware of 'the nature of the right being abandoned and the consequences of the decision to abandon it." United States v. Garibay, 143 F.3d 534, 536 (9th Cir. 1998) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). The Ninth Circuit has stated that "[t]here is a presumption against waiver." Garibay, 143 F.3d at 536. The standard of proof for a waiver of these constitutional rights is high. Miranda, 384 U.S. at 475. See United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (the burden on the government is great, the court must indulge every reasonable presumption against waiver of fundamental constitutional rights). Finally, it should be noted that, since Miranda rests on a constitutional foundation, see Dickerson v. United States, 530 U.S. 428, 438 (2000), no law or local court rule relieves the government of its burden to prove that Mr. Ramirez-Barraza voluntarily waived the Miranda protections. Miranda, 384 U.S. 475.

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 472 (1981); Johnson v. Zerbst, 304 U.S. 458, 464 (1983). See also United States v. Heldt, 745 F.2d at 1277; United States v. McCrary, 643 F.2d 323, 328-29 (9th Cir. 1981). In Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1990), the Ninth Circuit confirmed that the issue of the validity of a Miranda waiver requires a two prong analysis: the waiver must be both (1) voluntary, and (2) knowing and intelligent. Id. at 820.

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The voluntariness prong of this analysis "is equivalent to the voluntariness inquiry under the [Fifth] Amendment . . . ." Id. The second prong, requiring that the waiver be "knowing and intelligent," mandates an inquiry into whether "the waiver [was] made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." Id. at 820-21 (quoting Colorado v. Spring, 479 U.S. 564, 573 (1987)). This inquiry requires that the Court determine whether "the requisite level of comprehension" existed before the purported waiver may be upheld. Id. Thus, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal *both* an uncoerced choice *and* the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Id. (quoting Colorado v. Spring, 479 U.S. at 573) (emphasis in original) (citations omitted)).

Mr. Ramirez-Barraza's level of comprehension is particularly questionable in this case because of the undisputed fact that he received medical treatment for an ankle injury at El Centro Memorial Hospital immediately before he was advised of his Miranda rights. It is quite possible that Mr. Ramirez-Barraza received some type of pain medication as part of this treatment. It is not known at this time if Mr. Ramirez-Barraza was under the influence of such medications at the time of his alleged waiver of his Constitutional protections.

The government bears the burden of demonstrating a meaningful Miranda waiver by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 168 (1986). Moreover, this Court must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Schell v. Witek, 218 F.3d 1017, 1024 (9th Cir. 2000) (en banc) (citations omitted). Until the prosecution meets its burden of demonstrating through evidence that adequate Miranda warnings were given and that Ms. Ramirez-Barraza knowingly and intelligently waived his rights, Mr. Ramirez-Barraza's statements must be suppressed. Miranda, 384 U.S. at 479.

2. The Government Bears the Burden of Proving Mr. Ramirez-Barraza's Statements Were Made Voluntarily.

The government bears the burden to establish that any statements were voluntary. A defendant is deprived of due process if the Government uses his involuntary confession against him at trial. *Jackson v. Denny*, 378 U.S. 368, 377 (1964). "In evaluating voluntariness, the 'test is whether, considering the totality of the circumstances, the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.'" United States v. Male Juvenile, 280 F.3d 1008, 1022 (9th Cir. 2002) (quoting Derrick v. Peterson, 924 F.2d 813, 817 (9th Cir. 1991)).

The Government has the burden to prove that a defendant's statements were made independently of any law enforcement coercion and must do so by a preponderance of the evidence. United States v. Hanwood, 350 F.3d 1024, 1027 (9th Cir. 2003). The Government has not met its burden in this case, and absent evidence that the statements were voluntarily made, this Court should suppress Mr. Ramirez-Barraza's statements.

3. This Court Must Hold A Hearing Under 18 U.S.C. § 3501 To Determine Whether Mr. Ramirez-Barraza Statements Were Voluntary

Under 18, U.S.C. § 3501(a), "[b]efore [a] confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness." This Court is thus required to determine whether any statements made by Mr. Ramirez-Barraza were voluntary. Additionally, 18 U.S.C. § 3501(b) requires this Court to consider numerous enumerated factors in determining whether Mr. Ramirez-Barraza voluntarily made a statement. These factors include whether he understood the nature of the charges against him and whether he understood his constitutional rights.

Section 3501(a) clearly requires this Court to make a factual determination. When a factual determination is required, Federal Rule of Criminal Procedure 12 requires the court to make factual findings. See United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Since "'suppression hearings are often as important as the trial itself,'" these findings should be supported by evidence, not merely an unsubstantiated recitation of purported evidence in a prosecutor's responsive pleadings. Id. at 610 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)). Without the presentation of evidence, this Court cannot adequately consider the 18 U.S.C. § 3501(b) factors. Therefore, Mr. Ramirez-Barraza requests this Court conduct an evidentiary hearing pursuant to 18 U.S.C. § 3501(a) to determine, outside the presence of the jury, whether the statements he made were voluntary.

IV.

MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS

Mr. Ramirez-Barraza has received 110 pages of discovery. He has not however received any audiotapes of his deportation proceeding as well as a photocopy of the A-file. As information comes to light, due to the government providing additional discovery in response to these motions or an order of this Court, Mr. Ramirez-Barraza may find it necessary to file further motions. It is, therefore, requested that Mr. Ramirez-Barraza be allowed the opportunity to file further motions based upon information gained through the discovery process. Specifically, because Mr. Ramirez-Barraza's collateral attack on the underlying deportations relies on the audiotapes of the deportation proceedings, he requests the opportunity to file further briefing to support his collateral attack once he has been provided an opportunity to listen to the proceedings.

VIII.

CONCLUSION

For the foregoing reasons, Mr. Ramirez-Barraza respectfully requests that the Court grant the above motions.

Respectfully submitted,

Dated: March 7, 2008

s/ Victor N. Pippins
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